INDEX

	Page
Opinions Below	1
Jurisdiction	1
Question Presented	1
Constitutional and Statutory Provisions Involved	2
Statement	3
Reasons for Granting the Writ	5
Conclusion	14
Appendix A	15
Appendix B	19
Appendix C	20

CITATIONS

Cases:

Carroll v. United States, 354 U.S. 394 (1957)	9, 10
Ehlert v. United States, 402 U.S. 99 (1971)	4
Musser v. United States, 42 U.S.L.W. 3286	4
United States v. Apex Distributing Company, 270 F. 2d, 747 (9th Cir., 1959)	7
United States v. Bordon Co., 308 U.S. 188 (1939)	10
United States v. Brown, 481 F. 2d 1035 (8th Cir., 1973)	5
United States v. Findley, 439 F. 2d 970 (1st Cir., 1971)	6, 12
United States v. Folino, No. 42–1974 (3rd Cir. June 29, 1973)	4
United States v. Grochowski, 454 F. 2d 655 (7th Cir., 1971)	8, 11
United States v. Gustavson, 454 F. 2d 677 (7th Cir., 1971)	11
United States v. Hill, 473 F. 2d 759 (9th Cir., 1972)	12
United States v. King, No. 72–2213, decided March 21, 1973 (C.A. 4)	13

Page

Cases–Continued

United States v. McCreery, 473 F. 2d 1381 (7th Cir., 1973) 5, 13

United States v. Martin Linen Supply, 485 F. 2d 1143 (5th Cir., 1973) 5

United States v. Pecora, 484 F. 2d 1289 (3rd Cir., 1973) 4, 12, 14

United States v. Ponto, 454 F. 2d 647 (7th Cir., 1971) 8, 9, 11, 12

United States v. Rothfelder, 474 F. 2d 606 (6th Cir.), cert. denied, 413 U.S. 922 (1973) 5, 12

United States v. Shomock, 462 F. 2d 338 (3rd Cir., 1972) 4

United States v. Sisson, 399 U.S. 267 (1970) . . 7, 10, 14

United States v. Southern Railway Company, 485 F. 2d 309 (4th Cir., 1973) 5

United States v. Velazquez, 482 F. 2d 139 (2d Cir., 1973) 12, 13

United States v. Weller, 401 U.S. 254 (1971) 9

United States v. Weller, 466 F. 2d 1279 (9th Cir., 1972) 11, 12

United States v. Ziskowski, 465 F. 2d 480 (3rd Cir., 1972) 4

Statutes:

Federal Rules of Criminal Procedure, Rule 23(a) . . 5

18 U.S.C. 3731 . . . . . 1, 2

28 U.S.C. 1254(1) 1

50 U.S.C.A. 462(a) 3

In the Supreme Court of the United States

OCTOBER TERM, 1974

No.

UNITED STATES OF AMERICA

v.

DAVID EMERY SERFASS, PETITIONER

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

DAVID EMERY SERFASS, petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The Opinion of the Court of Appeals (Appendix "A", infra, pages 15-18) is not yet reported. The Opinion of the District Court (Appendix "C", infra, pages 20-43) was not reported.

JURISDICTION

The Judgment of the Court of Appeals (Appendix "B", infra, page 19) was entered on February 20, 1974. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

1. Whether under the Criminal Appeals Act (18 U.S.C. 3731), which provides that the United States may appeal to the

court of appeals from a decision of a district court dismissing an indictment "except that no Appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution," an Appeal by the United States is barred by the prior jeopardy when the district court grants a Pre-trial Motion to Dismiss, relying on facts outside the indictment, the district court relying on facts derived from the defendant's affidavit in support of his Motion, his Selective Service File, and from Stipulations of Counsel at oral argument on the Motion to Dismiss?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . ."

The Criminal Appeals Act, 18 U.S.C. 3731, as amended, 84 Stat. 1890, provides:

> "In a criminal case an appeal by the United States shall lie to a Court of Appeals from a decision, judgement, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.
>
> "An appeal by the United States shall lie to a Court of Appeals from a decision or order of a district court's suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after defendant has been put in jeopardy and before the verdict or finding of an indictment or information, if the United States Attorney certifies to the district court that appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.
>
> "The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has

been rendered and shall be diligently prosecuted.

"Pending the prosecution and determination of the appeal in the foregoing instances, the defendant shall be released in accordance with Chapter 207 of this title.

"The provisions of this Section shall be liberally construed to effectuate its purposes."

STATEMENT

Your Petitioner had been ordered for induction into the armed forces of the United States on December 18, 1970. The induction was to have taken place on January 18, 1971. On December 29, 1970, your Petitioner requested a special form for conscientious objectors (Form SSS–150). (Selective Service File, pages 74, 75.) His local board, Local Board No. 89, then received the completed Form 150 from the Petitioner, who requested a courtesy interview on January 11, 1971, and received such on January 13, 1971. (Selective Service File, pages 77, 78–97.) The local board considered his entire file at a meeting on January 13, 1971, and on January 14, 1971, your Petitioner was informed that the Board unanimously agreed "that there was no change over which the [Petitioner] had no control." On this basis, the board decided not to re-open his file. (Selective Service File, 103.) The Petitioner then refused induction at the examining station in Wilkes-Barre, Pennsylvania, on January 18, 1971. (Selective Service File, 118.) Your Petitioner was thereafter indicted and arraigned, the indictment being for a violation of 50 U.S.C. App. 462(a). At the arraignment, the Petitioner pleaded "not guilty" and the trial date was set for January 9, 1973. Subsequent to this, a Motion to Postpone the Trial was filed and granted. At the same time, a Motion to Dismiss the Indictment was also filed. The Briefs of the Government and your Petitioner were submitted and argument on the Motion to Dismiss was held before Judge Michael Sheridan, Chief Judge, United State District Court for the Middle District of Pennsylvania.

In an Opinion filed July 16, 1973, Judge Sheridan granted the Petitioner's Motion to Dismiss the Indictment. The Court held that the statement of reasons was sufficiently ambiguous to be reasonably construed as a rejection on the merits which would prejudice the Petitioner's right to in-service review and, therefore, granted the Motion to Dismiss.

The United States filed a Motion of Appeal to the Court of Appeals seeking a review of the district court's order dismissing the indictment. The Government in its Brief contended jurisdiction on the basis of 18 U.S.C. 3731. Your Petitioner's Brief contended that the order of the district court dismissing the indictment was not an appealable order and that the Circuit Court of Appeals, therefore, did not have jurisdiction to hear the appeal as your Petitioner would then be put twice in jeopardy. The Court of Appeals held that under Section 3731 jeopardy had not yet attached and, therefore, dismissal of the indictment in the instant case was an appealable order, and went on to decide the merits of the Government's appeal, and basing its decision on *Musser v. United States,* 42 U.S.L.W. 3286 (U.S., November 13, 1973), decided that since the cases of *United States v. Shomock,* 462 F. 2d 338 (3rd Cir., 1972), *United States v. Ziskowski,* 465 F. 2d 480 (3rd Cir., 1972, and *United States v. Folino,* No. 72–1974 (3rd Cir. June 29, 1973), among others relied upon by your Petitioner were overruled and that, therefore, the "no man's land" discussed in *Ehlert v. United States,* 1971, 402 U.S. 99, 103–04 & n. 7, 107, did not exist, your Petitioner would have had the chance for in-service review of his conscientious objector request and was not denied due process of law.

In reaching the result that the order of the district court dismissing the indictment was an appealable order, the court relied on *United States v. Pecora,* 484 F. 2d 1289 (3rd Cir., 1973) which held appealable a district court's pre-trial dismissal of an indictment based upon a stipulation of facts upon which

the indictment was returned. The court placed heavy emphasis on the fact that the Petitioner had not waived his right to a jury trial pursuant to Rule 23(a) of the Federal Rules of Criminal Procedure and that even though your Petitioner –

> ". . . had established a defense as a matter of law, rather than upon the finding, as in *Pecora* that there were insufficient facts as a matter of law to support any conviction, we see no significant constitutional difference between the two situations. Both involved a determination as to the legal sufficiency of certain facts, and in either case, denial of the Motion to Dismiss entitled the defendant to the jury trial which he has not waived. We therefore hold that jeopardy did not attach and the dismissal of the indictment in the instant case was an appealable order."

Citing *United States v. Martin Linen Supply*, 485 F. 2d 1143 (5th Cir., 1973), *United States v. Brown*, 481 F. 2d 1035 (8th Cir., 1973).

The notation is also made in the footnotes that contrary decisions stand in other circuits, namely, *United States v. Southern Railway Company*, 485 F. 2d 309 (4th Cir., 1973); *United States v. Rothfelder*, 474 F. 2d 606 (6th Cir.), *cert. denied*, 413 U.S. 922 (1973); *United States v. McCreery*, 473 F. 2d, 1381 (7th Cir., 1973).

REASONS FOR GRANTING THE WRIT

This case raises very important issues on the meaning of the double jeopardy clause of the United States Constitution and the statutory construction of a recently amended Criminal Appeals Act, 18 U.S.C. 3731. The construction of this statutory section, as applied by the Third Circuit Court of Appeals in this case, has put the defendant, your Petitioner, in jeopardy in violation of the clear import of the statute itself and the United States Constitution.

Title 18, U.S.C. 3731 provides in pertinent part:

> "In a criminal case, an appeal by the United States

> shall lie to a Court of Appeals from a decision, judgment or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution . . .".

The question presented as to whether or not the Circuit Court of Appeals had jurisdiction to hear an appeal by the Government from the dismissal of an indictment was faced by the United States Court of Appeals, First Circuit, in *United States v. Findlev,* 439 F. 2d 970 (1st Cir., 1971). In that case the defendant, under a 1–A classification by the Selective Service System, was ordered to report for induction on June 24, 1969. He completed and returned to his local board the necessary SSS Form 150, seeking to be classified as a conscientious objector on June 2, 1969. The board, after consideration of his claim, wrote to him as follows:

> "This letter is to advise that your case was considered by the board at a meeting held June 24, 1969. The board did not re-open your classification."

On the date of induction, which was then scheduled for August 26, 1969, the defendant reported but refused to submit. He was indicted under 50 U.S.C. App. Section 462. He filed a Motion to Dismiss the Indictment on the ground that the board did not give him any reasons for its refusal to re-open his classification. At hearing on the Motion to Dismiss the Government stipulated that the defendant's case was a post order to report situation and, also, that the board had given no reason for its refusal to reopen. The district court found in favor of the defendant and granted his Motion to Dismiss. The Government appealed under 18 U.S.C. Section 3731.

The Court of Appeals in considering the question of jurisdiction examined Section 3731, paragraph 6 authorizing appeal to the Court of Appeals, which then read as follows:

> "From a decision or judgment, setting aside or dis-

> missing any indictment or information, or any count thereof, except where a direct appeal to the Supreme Court of the United States is provided by this section."

In citing *United States v. Apex Distributing Company*, 270 F. 2d, 747, (9th Cir., 1959), that court stated that that section authorized appeals only from those dismissals based upon defects in the indictment or information or in the institution of the prosecution. The court then stated,

> "We believe this limitation properly reflects the statutory purpose, at least to this extent: that if a dismissal is a result of the showing of evidentiary facts, dehors the indictment, which, if established at a trial would constitute a defense on the merits, the court's ruling, however described . . . is, in effect an acquittal . . . and thus, not within the attended purpose of the appeal statute. *Findley*, did present a defense on the merits (the invalidity of the induction order due to improper classification), based on such independent facts." (*Findley, supra*, at 972.)

The court further supports its judgment by stating that if the defendant had waited until trial to set forth and approve the facts as presented in the hearing on the Motion to Dismiss, he would have, assuming a correct view of the law by the court been entitled to an acquittal from which no appeal would lie. This conclusion is arrived at even though the court explicitly stated that Findley had not formally been put in jeopardy and even though the parties had stipulated to additional facts and questions. In citing *United States v. Sisson*, 399 U.S. 267, 90 S. Ct. 2117, 26 L. Ed. 2d 608 (1970), in which the basic ground rules for the exclusion of appeals was stated as being where the decision of the court was based on the merits, the court concluded as follows:

> "If an appeal will lie in the present case, while it cannot if the defendant waits and subjects himself to jeopardy, informed counsel believing they have a defense on the merits will henceforth protect their

> clients by avoiding and expediting procedure otherwise beneficial to all concerned, and only ignorant and ill-advised defendants will subject their defense on the merits to a Government appeal. We will not adopt such a penalizing construction of the statute."

With this conclusion, the appeal was dismissed for want of jurisdiction.

United States v. Ponto, 454 F. 2d, 647 (7th Cir., 1971), decided the identical jurisdictional question. That case also involved a Selective Service violation under 50 U.S.C. App. Section 462, a Motion to Dismiss the Indictment and a district court granting the defendant's motion. The Government appealed under 18 U.S.C. Section 3731. The Court held that in a case where the district court granted a registrant's motion for a dismissal of the indictment and a prosecution for failure to submit to induction and it made no reference at all to the wording or form of the indictment itself or to the manner in which the grand jury considered the original indictment, and where the arguments on the hearing on the motion to dismiss were related to the local board's procedures with reference to the processing of registrant's claim, and where the district court rules that the local board had erroneously refused to reopen the registrant's classification, the granting of the registrant's motion for dismissal of the indictment was not based upon a defect in the indictment or in the institution of the prosecution but rather on the merits and, therefore, appeal by the Government was precluded. In a companion case of *United States v. Grochowski,* 454 F. 2d 655 (7th Cir., 1971), the court reached the same conclusion. Here, as in *Ponto, supra,* the argument was made that in the alternative the decision of the district court was available to the Supreme Court under the "motion in bar" provision of the Criminal Appeals Act under 18 U.S.C., Section 3731 as it then existed. The court then held that the dismissal of the indictment was not a "motion in bar" because of the fact that the defendant did not confess to the crime and claim

immunity but to the contrary argued that he was not guilty of having committed a crime. Here the court cites *United States v. Weller*, 401 U.S. 254, 91 S. Ct., 602, 28 L. Ed. 2d 26 (1971). In addition, the court followed its holding in *Ponto, supra,* and ruled that the appeal from the district court, which had granted the defendant's Motion to Dismiss the Indictment, should be dismissed for want of jurisdiction.

Both the cases then were reheard by the court en banc, and a more particular, involved legislative and statutory history with reference to the appealability of criminal cases by the Government was looked into. The court stated,

> "Thus, the Government, under the 1948 legislation, could appeal under paragraph 6 from dismissals of indictments under Rule 12 which would have been cognizable in legal basis as orders responsive to demurrers or pleas in abatement at common law. And, as indicated earlier, these common law pleas were limited to objections to the wording in the indictment or to the proceedings culminating in the issuance of the indictment." *Ponto, supra.* at 6060.

In responding to the question as to whether or not the court should interpret paragraphs of the former Section 3731 according to the plain meaning of the words in the provision as proposed by the government, the court answered and cited *Carroll v. United States*, 354 U.S. 394, 399, 77 S. Ct., 1332, 1336, 1 L. Ed. 2d 1442 (1957),

> "It is axiomatic, as a matter of history as well as doctrine, that the existence of appellate jurisdiction in a specific federal court over a given type of case is dependent upon authority expressly conferred by statute. And since the jurisdictional statute prevailing at any given time is so much a product of the whole history of both growth and limitation of federal court jurisdiction since the first judiciary act, 1 Stat. 73, they have always been interpreted in light of that history and in the axiom that clear statutory mandates must exist to found jurisdiction."

Another interpretation of paragraph 6 of the former Section 3731, urged by the Government was that the court should examine the effect of a dismissal order rather than the reason for its entry. The court states, in answer to that proposal, that such interpretation would include almost all dismissals prior to trial. The court then goes on to state that they did not believe such a broad reading was intended by Congress. Further, the court makes it clear that it believes that such a broad reading of the words in Section 3731 would violate the long-standing principle that the act should be strictly construed against the Government's right to appeal. Citing *United States v. Sisson,* 399 U.S. 267, 270, 286, 291, 90 S. Ct. 2117, 26 L. Ed. 2d, 608 (1970); *Carroll, supra,* at 394, 400, 406; *United States v. Borden Co.,* 308 U.S. 188, 192, 60 S. Ct. 182, 84 L. Ed. 181 (1939). The court then goes on to affirm that,

> "An objection to the local board's classification of a registrant can be raised as a defense to a prosecution under 50 U.S.C. App. Section 462. The Selective Service Act, 50 U.S.C. App. Section 460(b)(3) provides that all questions relating to judicial review of the classification and processing by a board be reviewed in this manner. The motion in the instant case presented questions concerning *Ponto's* classification, which are raised only by defense. This decision to dismiss by the district judge was based on questions presented by his defense. As such, it was a ruling on the merits on the defense." *Ponto, supra,* at 663.

In addition, the court goes on to assert that the defense raised by the motion in the district court could well have been decided at trial. However, it points out that a defense on the merits can just as well be decided prior to trial. It goes on to state that Rule 12(b)(1) of the Federal Rules of Civil Procedure clearly allows a party to present a Motion to Dismiss prior to trial based on a defense "which is capable of determination without trial of the general issue . . .", the court then found that the Motion to Dismiss as ruled upon by the district court fits into

that category. The court states, in conclusion, that the dismissal order was a determination on the merits and, as such, was an acquittal to which jeopardy attached.

> "Thus, Government appeals from this ruling would violate the double jeopardy clause of the Fifth Amendment since a retrial on the charge would be prohibited."

For these reasons, the court dismissed the appeal for lack of jurisdiction.

In reconsidering *Grochowski, supra,* the same conclusion was reached. And, in a case heard on the same dates as the decision on rehearing of *Ponto* and *Grochowski,* namely *United States v. Gustavson,* 454 F. 2d 677 (7th Cir., 1971), a case in which the defendant was indicted for refusal to submit to induction and prior to trial the district court granted the defense counsel's Motion to Dismiss the Indictment the Government appeal to the Court of Appeals was dismissed for lack of jurisdiction.

In the *United States v. Weller,* 466 F. 2d 1279 (9th Cir., 1972), the identical question was reviewed and decided. Here, again, the indictment for refusal to submit to induction was dismissed. The court affirmed that the decision to dismiss by the district court was not based upon any defect in the indictment or in the institution of the prosecution, but rather was based solely upon the validity of a Selective Service regulation barring the appearance of counsel before a local board. It further stated that the issue which was raised was in the nature of a defense to the crime charged and because of this, the Court of Appeals did not have jurisdiction to hear and determine the appeal under 18 U.S.C.A. Section 3731, especially in light of interpreting the statute with an eye to its legislative history. These cases cited above relate to interpretations of the statute before the amended statute which would be applicable in this case. However, many of the circuits have interpreted the question at hand in this case with the history of the statute in mind and the decisions under the prior section of the Criminal Appeals Act serve great aid in guiding decisions based on the

new statute. At any rate, even given the fact that the prior holdings relating to the statute as it formerly existed should be used as a guideline in determining the meaning of the statute, there is a clear conflict in the decisions by different circuit courts of appeal on this issue. In the *United States v. Rothfelder,* 474 F. 2d 606 (6th Cir., No. 72–1473, Supreme Court, cert. denied, 1973), the Sixth Circuit also followed the holdings in *Findley, supra, Ponto, supra,* and *Weller, supra,* in holding that where the district court in dismissing the indictment considered evidence in the registrant's Selective Service File, the judgment of the district court in dismissing the indictment was, in effect, an acquittal and the Government did not have a right to appeal under 18 U.S.C.A., Section 3731. In *United States v. Velazquez,* 482 F. 2d 139 (2nd Cir., 1973) 18 U.S.C.A. Section 3731 was reviewed and decided. Although we feel there are distinguishing factors in that case which would separate it from the case at hand, the court determined that it had jurisdiction to review the dismissal of the indictment. In *United States v. Pecora,* 484 F. 2d 1289 (3rd Cir., 1973), the case relied upon by the Third Circuit Court of Appeals in our case to determine that there was jurisdiction to hear the appeal, the court concluded that in that case where jeopardy had not attached at the time of the pre-trial dismissal of the indictment, the Government could appeal the dismissal. The distinguishing feature in that case centers around a point set forth in the notes of the Court of Appeals' decision in this case. The court recognized that there might be a distinction between the decision in *United States v. Hill,* 473 F. 2d 759 (9th Cir., 1972) and *Pecora.* The court states that it did not feel that this distinction made the instant order appealable but did state that to the extent that *Pecora* and *Hill* might be inconsistent, the court found itself bound by *Pecora.*

The most telling question to be analyzed is the effect of the change in the section in the subsequent effect of prior decisions

based on the old section in helping us to determine the appealability of certain matters under the new. The amendment of the Criminal Appeals Act section at hand became effective on January 2, 1971 and it would clearly apply to the case at bar. The argument was made in *United States v. McCreery*, 473 F. 2d 1381 (7th Cir., 1973) that the decisions based upon interpretations of the prior statute cannot aid questions arising under the new amendment. The court in response to this position stated as follows:

> "The Government does not contend this case is factually distinguishable from *Ponto*. It correctly points out that *Ponto* arose prior to the amendment of the Criminal Appeals Act which became effective on January 2, 1971, whereas the amended statute is applicable to this appeal. See 84 Stat. 1880, 1890. But our decision in *Ponto* rested on two independent grounds, one statutory and one constitutional. Assuming, *arguendo* that the statutory analysis is not applicable to the amended act, it is nevertheless perfectly clear that the constitutional analysis in *Ponto* compelled the conclusion that the order of April 20, 1972 was an acquittal from which the government may not appeal . . . The Government's arguments to the contrary merely restate the reasoning of the dissenting opinion in *Ponto* which was squarely rejected by the en banc majority. See 454 F. 2d at 667."

In summary, the dismissal of the indictment here was based on the merits and it is clear that jeopardy had attached. The Court of Appeals erred in concluding to the contrary.

There is a clear conflict among the courts of appeal regarding the construction and effect given to this section of the Criminal Appeals Act. As set forth above, the Sixth, Seventh, Ninth and under *United States v. King*, No. 72–2213, decided March 21, 1973 (C.A. 4) Fourth Circuits disagree with the decisions rendered under jurisdiction of the Second and Third Circuits in *Velazquez, supra*, and this case upon which the Third Circuit

relied on its earlier decision in *Pecora, supra,* in deciding the jurisdictional question. It is clear that final guidelines should be given as to interpretation to be given to the Criminal Appeals Act,

> "Otherwise the courts and authorities must [continue to] expend energy, not on the merits of dispute settlement, but simply on deciding whether a court has the power to hear a case." *United States v. Sisson,* 399 U.S. 267, 307.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted.

Harry A. Dower
Boyd G. Hixson
Barry N. Mosebach

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

No. 15229 Cr.

UNITED STATES OF AMERICA

v.

DAVID EMERY SERFASS

APPEARANCES:

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UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

No. 15229 Cr.

UNITED STATES OF AMERICA

v.

DAVID EMERY SERFASS

MEMORANDUM

David Emery Serfass is accused of having violated 50 U.S.C. App. Section 462 by wilfully and knowingly failing to comply with an order of his Local Board to submit to induction into the Armed Forces of the United States. He has filed a motion to dismiss the indictment, contending that he was denied due process of law when the Board inadequately set forth its reasons for denying a post-induction-order request to reopen his classification. This defense is properly raised by motion before trial,[1] especially since none of the facts upon which its resolution

[1] *Accord,* United States v. Ponto, 7 Cir. 1971, 454 F. 2d 657, 663, 664 n.10, 665; United States v. Gustavson, 7 Cir. 1971, 454 F. 2d 677, 678 & n.4; United States v. Martinez, W.D. Pa. 1972, 350 F. Supp. 971, 972–73; United States v. England, W.D. Mo. 1971, 348 F. Supp. 851, 853 n.1; United States v. O'Rourke, S.D. N.Y. 1972, 341 F. Supp. 622, 623 & n.1; United States v. Seeley, D.R.I. 1969, 301 F. Supp. 811; *see* United States v. Henry, E.D. La. 1972, 344 F. Supp. 1; United States v. Stewart, N.D. Cal. 1969, 306 F. Supp. 29, *appeal dismissed,* 1970, 396 U.S. 1066; United States v. Haffner, D. Hawaii 1969, 301 F. Supp. 828; *cf.* United States v. Sisson, 1970, 399 U.S. 267, 325 & n.2, 326, 331–32 & n.6, 348 (White, J., with whom Burger, C.J., and Douglas, J., join, dissenting). *Contra,* Unites States v. Shelly, E.D. Pa. 1971, 330 F. Supp. 1214; *see* United States v. Sisson, 1970, 399 U.S. 267, 301 & n.55; United States v. Ramos, 1 Cir. 1969, 413 F. 2d 743, 744 n.1; United States v. Winer, E.D. Pa. 1971, 323 F. Supp. 604; United States v. Fargas, S.D. N.Y. 1967, 267 F. Supp. 452, 455–57. *See also* United States v. Findley, 1 Cir. 1971, 439 F. 2d 970.

depends is in dispute.[2] Fed. R. Crim. P. 12(b)(1). Briefs have been submitted and oral argument made with respect to defendant's motion.

The material facts are derived from defendant's affidavit in support of his motion, from his Selective Service file, and from the admissions of counsel.[3]

On November 16, 1970, Serfass was mailed an order to report for induction on December 1, 1970. Supervening events resulted in a postponement of his scheduled induction date until January 18, 1971. He requested the special form for registrants seeking conscientious objector status on December 29, 1970. The completed form, supplemented by additional material in support of his application, was returned to the Board on January 8, 1971. Simultaneously, he asked that his classification be reopened and that he be granted a courtesy interview. He subsequently appeared before the Board on January 13, 1971.

At oral argument on the motion to dismiss, defense counsel and the Assistant United States Attorney stipulated[4] that the

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[2] *See* United States v. Sisson, 1970, 399 U.S. 267, 301–02 & nn. 55, 56; United States v. Knox, 1969, 396 U.S. 77, 83 & n.7; United States v. Covington, 1969, 395 U.S. 57, 60–61; United States v. Fargas, S.D. N.Y. 1967, 267 F. Supp. 452, 455–57.

[3] Although defendant has not waived his right to trial by jury, a defense based upon an alleged procedural defect in the Selective Service classification process is to be determined by the court. Fed. R. Crim. P. 12 (b) (4); United States v. England, W.D. Mo. 1971, 348 F. Supp. 851, 853; United States v. O'Rourke, S.D. N.Y. 1972, 341 F. Supp. 622, 627; *accord*, Cox v. United States, 1947, 332 U.S. 442, 452–53; United States v. Ponto, 7 Cir. 1971, 454 F. 2d 657, 663; United States v. Ramos, 1 Cir. 1969, 413 F. 2d 743, 744 n.1; Martinetto v. United States, 9 Cir. 1968, 391 F. 2d 346; *see* United States v. Martinez, W.D. Pa. 1972, 350 F. Supp. 971, 973; United States v. Seeley, D.R.I. 1969, 301 F. Supp. 811.

[4] A judicial admission need not be in writing if made in court during counsel's management of the litigation. 9 Wigmore, Evidence Section 2594 (3d ed. 1940). Furthermore, such admissions are effective in both civil and criminal cases. 9 Wigmore, Evidence Section 2592 (3d ed. 1940); *see, e.g.*, United States v. Harding, 10 Cir. 1972, 475 F. 2d 480,484.

information which Serfass submitted to the Board establishes a prima facie claim for conscientious objector status[5] based upon late crystallization.

By letter dated January 14, 1971, defendant was notified that the "Local Board considered your entire file at their meeting on January 13, 1971, and unanimously agreed that there was no change over which you had no control and decided not to re-open your file." This is the only statement of reasons given by the Board in support of its decision.

Subsequently, he refused induction, and this prosecution followed.

The enumerated facts indicate clearly that Serfass is entitled to full consideration of his claim prior to assignment to combatant training and service. Ehlert v. United States, 1971, 402 U.S. 99, 103–04 & n.7, 107. Therefore, since the statement of reasons given for refusing to reopen is sufficiently ambiguous to be reasonably construed as a rejection on the merits,[6] thereby prejudicing his right to in-service review,[7] defendant's motion to dismiss the indictment will be granted.

Chief Judge
Middle District of Pennsylvania

Dated: July 16, 1973.

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[5] *See e.g.*, Thompson v. United States, 9 Cir. 1973, 474 F. 2d 323, 326.

[6] The courtesy interview given Serfass prior to the Board's decision would make such an interpretation particularly reasonable. United States v. Ziskowski, 3 Cir. 1972, 465 F. 2d 480, 485 n.13. This is not a case in which the Board's formulation compels the inference that its decision is based upon the jurisdictional limitation imposed by 32 C.F.R. 1625.2 (1971). United States v. Marabella, No. 15227 Criminal (M.D. Pa. April 5, 1973). *Compare* Ehlert v. United States, 1971, 402 U.S. 99, 100, *with* United States v. Alioto, 1 Cir. 1972, 469 F. 2d 722, 726, *and* United States v. Ziskowski, 3 Cir. 1972, 465 F. 2d 480, 484 & n.10.

[7] United States v. Folino, No. 72–1974 (3 Cir. June 29, 1973); United States v. Ziskowski, 3 Cir. 1972, 465 F. 2d 480; *accord*, United States v. Alioto, 1 Cir. 1972, 469 F. 2d 722; United States v. Shomock, 3 Cir. 1972, 462 F. 2d 338; *cf.* United States v. Kline, M.D. Pa. 1972, 354 F. Supp. 931, 939–40 & n.17, *aff'd without published opinion*, 3 Cir. 1972, 474 F. 2d 1337.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 73–1736

UNITED STATES OF AMERICA, APPELLANT

v.

DAVID EMERY SERFASS

(D.C. CRIMINAL NO. 15229)

Present: VAN DUSEN, ALDISERT and ROSENN, *Circuit Judges.*

JUDGMENT

ON APPEAL from the United States District Court for the Middle District of Pennsylvania.

THIS CAUSE came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was submitted on briefs under Third Circuit Rule 12(6).

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the said District Court filed July 16, 1973, be, and the same is hereby reversed and the cause is hereby remanded to the District Court for trial or other further proceedings in accordance with the opinion of this Court

THOMAS F. QUINN,
Clerk

February 20, 1974
Certified as a true copy and issued in lieu of a formal mandate on March 14, 1974.
Attest:

THOMAS F. QUINN,
Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 73–1736

UNITED STATES OF AMERICA, APPELLANT

v.

DAVID EMERY SERFASS

Appeal From United States District Court for the Middle District of Pennsylvania

Submitted under Third Circuit Rule 12(6) December 19, 1973
Before VAN DUSEN, ALDISERT and ROSENN, *Circuit Judges.*

JAMES W. WALKER, ESQUIRE
for appellant
HARRY A. DOWER, ESQUIRE
BOYD G. HIXSON, ESQUIRE
Dower, Mackson, Hauff & Hettinger
for appellee

OPINION OF THE COURT
(Filed February 20, 1974)

ROSENN, *Circuit Judge*

This appeal is hopefully one of the last of a long series of selective service cases involving the issue of whether an order to report for induction was invalid for failure of the local board to reopen the registrant's classification pursuant to a post-induction order request for conscientious objector status. Since the district court of the Middle District of Pennsylvania dismissed the indictment, the defendant also raises on appeal the issue of double jeopardy. Because we find the order of dismissal is appealable, and the dismissal was improper in light of the subsequent decision in *Musser v. United States*, 42 U.S.L.W. 3286 (U.S. November 13, 1973), we reverse.

The facts of this case are not in dispute. On November 16, 1970, Serfass was ordered by his local board to report for induction on December 1. He appeared on December 1 and requested a delay in his induction in order that he could submit additional medical evidence. The delay was granted, but on December 18 he was again ordered to report for induction, this time on January 18, 1971. On December 29, he visited his local board and requested the form for conscientious objector application, SSS–150. His form 150 was returned to the local board on January 8, and on January 13 he received a courtesy interview as he had requested. By letter dated January 14, the board notified him that it had considered his entire file and "unanimously agreed that there was no change over which you had no control and decided not to re-open your file." The board also informed him that he was still obligated to report for induction on January 18. No other reasons for the refusal to reopen his file were given. On January 18, Serfass appeared at the examining station and refused induction. This prosecution followed under 50 App. U.S.C. §462.

Before trial, Serfass moved for dismissal of the indictment on the ground that the local board had denied him due process by inadequately setting forth its reasons for denying his request to reopen his classification and to grant him conscientious objector

status. The district court granted this motion, relying on defendant's selective service file, his affidavit in support of his motion which set forth that he had applied for conscientious objector status and had received from his local board only the January 14 letter denying him claim, and a stipulation of counsel that the information he sent to the board set forth a prima facie conscientious objector claim based upon late crystallization of beliefs.

On the basis of the law prevailing in this Circuit at that time, the district court stated in its opinion:

> The enumerated facts indicate clearly that Serfass is entitled to full consideration of his claim prior to assignment to combatant training and service. *Ehlert v. United States*, 1971, 402 U.S. 99, 103–04 & n. 7, 107. Therefore, since the statement of reasons given for refusing to reopen is sufficiently ambiguous to be reasonably construed as a rejection on the merits, thereby prejudicing his right to in-service review, defendant's motion to dismiss the indictment will be granted. [Footnotes omitted.]

The footnotes indicate that the court relied primarily upon *United States v. Ziskowski*, 465 F.2d 480 (3d Cir. 1972), and *United States v. Folino*, No. 72–1974 (3d Cir. June 29, 1973).

I.

We first consider defendant's contention that we have no jurisdiction to hear this Government appeal from the district court's dismissal of the indictment. Resolution of this contention turns upon our construction of the Criminal Appeals Act, 18 U.S.C. §3731, which reads:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

* * *

> The provisions of this section shall be liberally construed to effectuate its purposes.

This version of the Act is applicable to all actions begun in any district court after January 2, 1971, (84 Stat. 1890, 1893) and therefore applies to the present action.

Actions brought prior to January 2, 1971, were governed by an earlier version of the Criminal Appeals Act, the relevant portion of which made a criminal case appealable by the United States to the court of appeals:

> [F]rom a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, except where a direct appeal to the Supreme Court is provided by this section.

See United States v. Pack, 247 F.2d 168 (3d Cir. 1957).

Under this former version of the Act it is clear that no appeal by the United States would lie in the instant case. Appeals were permissible only if the dismissal of an indictment was based upon a defect in the indictment or in the institution of the prosecution, rather than upon evidentiary facts outside the face of the indictment which would possibly constitute a defense at trial. *See, e.g., United States v. Ponto*, 454 F.2d 657, 663 (7th Cir. 1971) (en banc); *United States v. Findley*, 437 F.2d 970 (1st Cir. 1971).

The 1971 amendment to §3731, however, was clearly intended to enlarge the Government's right to appeal to include all cases in which such an appeal would be constitutionally permissible. Cases decided under the prior version of §3731 are of little aid in determining appealability under the present version. *See United States v. Pecora*, 484 F.2d 1289 (3d Cir. 1973).

In *Pecora*, we held appealable under the present version of §3731 the district court's pretrial dismissal of an indictment based upon a stipulation of the facts upon which the indictment was returned.

In discussing the appealability of the pretrial dismissal, we indicated that absent the defendant's waiver of his right to a jury trial pursuant to Rule 23(a) of the Federal Rules of Criminal Procedure, jeopardy does not attach until the jury has been impaneled and sworn. We held that entering into the stipulation of facts "for the purpose only of attacking the validity of the indictment did not constitute the waiver necessary under Rule 23(a)." Therefore, we concluded, since jeopardy had not attached at the time of the pretrial dismissal of the indictment, the government could appeal the dismissal. *United States v. Pecora*, 484 F.2d at 1292–93. We also rejected as inconsistent with §3731 the contention that our holding would discourage defense counsel from expediting procedure by making pretrial motions for dismissal, and instead encourage counsel to wait until the jury was sworn before making motions for dismissal. 484 F.2d at 1289. *See* Fed. R. Crim. Proc. 12(b).

We believe the instant appeal is squarely controlled by *United States v. Pecora, supra.* As in *Pecora*, the pretrial motion of dismissal was based upon undisputed facts raising a legal issue and the defendant did not waive his right to a jury trial.[1]

[1] The district court in this case expressly found that the defendant did not waive his right to a jury trial. Not only were none of the procedures required by Rule 23(a) complied with, but attached to the motion to dismiss the indictment was a motion to postpone the trial until after the disposition of the motion on the merits. *Cf.* United States v. Wilson, 73-1444 (3d Cir., filed January 15, 1974) (opinion sur denial of panel rehearing) (*post-trial* directed verdict of acquittal).

Pecora distinguished United States v. Hill, 473 F.2d 759 (9th Cir. 1972), which held unappealable the district court's pretrial dismissal of an indictment alleging the mailing of obscene advertisements. The dismissal was on the ground that the stipulated materials were not legally obscene. *Hill* was distinguished on two grounds. First, the Court of Appeals in *Hill* did not determine whether the defendant had waived his right to a jury trial. Second, in *Hill* "evidence was actually entered into the record. The district court determined the character of that evidence so it may be said that jeopardy had attached." We do not consider this second distinction

Although the instant dismissal was based upon the trial court's finding that the defendant had established a defense as a matter of law, rather than upon the finding, as in *Pecora*, that there were insufficient facts as a matter of law to support a conviction, we see no significant constitutional difference between the two situations. Both involved a determination as to the legal sufficiency of certain facts, and in either case denial of the motion to dismiss entitled the defendant to the jury trial which he has not waived. We therefore hold that jeopardy did not attach and the dismissal of the indictment in the instant case was an appealable order.[2]

II.

Our consideration of the merits of the Government's appeal requires a cursory review of the line of cases in this circuit upon which the district court's dismissal of the indictment was based. At all pertinent times, the post-induction order reopening of a registrant's selective service classification by his local board was governed by Regulation 1625.2, 32 CFR §1625.2, which provided that,

> [T]he classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction . . . unless the local board *first specifically finds* there has been *a change in the registrant's status resulting from circum-*

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between *Pecora* and *Hill* to permit our holding the instant order unappealable. To the extent that *Pecora* and *Hill* may be inconsistent, we are of course bound by *Pecora*.

[2] *Accord*: United States v. Martin Linen Supply, 485 F.2d 1143 (5th Cir. 1973); United States v. Brown, 481 F.2d 1035 (8th Cir. 1973).

Contra: United States v. Southern Railway Company, 485 F.2d 309 (4th Cir. 1973); United States v. Rothfelder, 474 F.2d 606 (6th Cir), *cert. denied*, 413 U.S. 922 (1973); United States v. McCreery, 473 F.2d 1381 (7th Cir. 1973).

See also: United States v. Hill, 473 F.2d 759 (9th Cir. 1972), distinguished by this court in *Pecora*. *See* note 1 *supra*.

stances over which the registrant had no control.[3]
[Emphasis supplied.]

In *Ehlert v. United States*, 402 U.S. 99 (1971), a registrant who had submitted a post-induction order conscientious objector claim refused induction after being notified by his local board that,

> [I]t had declined to reopen his classification because the crystallization of his conscientious objection did not constitute the "change in the registrant's status resulting from circumstances over which the registrant had no control" required for post-induction notice reopening.

402 U.S. at 100. The Supreme Court affirmed the ensuing conviction, rejecting the registrant's claim that crystallization of conscientious objection is a circumstance over which he had no control. While agreeing that the language of the regulation was "not free from doubt," the Court regarded as controlling the Government's "plausible" and "consistently urged" interpretation that the regulation only applied to "objectively identifiable" and "extraneous" circumstances, 402 U.S. at 104, and that reopening was not required for a change in beliefs.

Furthermore the Court held this interpretation to be a valid timeliness rule, since the military already had procedures for handling in-service conscientious objector claims, and post-induction order claims could legitimately be decided by the military forum as long as claimants were not subject to combatant training or service until their claims had been acted upon.

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[3] Regulation 1625.2, 32 CFR §1625.2 in pertinent part provided:

The local board may reopen and consider anew the classification of a registrant . . . upon the written request of the registrant . . . if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; . . . provided . . . the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 250) . . . unless the local board first makes the finding that there is a change in status resulting from circumstances over which the registrant had no control.

The Court held, however, that "a 'no man's land' would be intolerable," 402 U.S. at 104 n. 7, and a conscientious objector claimant must be given some opportunity to have his claim heard on the merits, either by his local board or by the military, whenever the change in his beliefs occured. The Court therefore felt obligated to look at existing military procedures to determine whether the requirement that all claimants receive some forum to present their claims was met in practice. Although recognizing that the "somewhat inconsistent" military regulations "contained formulations seeming to look the other way," 402 U.S. at 106,[4] the Court relied upon a letter written by the General Counsel of the Army which stated that present practice, as well as practice when the registrant had been ordered to report for induction, permitted presentation to the military of such post-induction order conscientious objector claims, and that there was no possibility that late crystallizers would find themselves without a forum in which to present their claims. The Court accepted this statement, warning that if a situation should arise "in which neither the local board nor the military had made a full opportunity to present a prima facie conscientious objector claim for determination under established criteria, . . . a wholly different case would be presented." 402 U.S. at 107. The Court concluded by stating that,

> [W]e hold that the Court of Appeals did not misconstrue the Selective Service regulation in holding that

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[4] The Court cited Army Regulation No. 635-20, ¶3:

a. Consideration will be given to requests for separation based on bona fide conscientious objection to participation in war, in any form, when such objection develops subsequent to entry into the military service.

b. Federal courts have held that a claim to exemption from military service under Selective Service laws must be interposed prior to notice of induction, and failure to make timely claim for exemption constitutes waiver of the right to claim . . . Requests for discharge after entering military service will not be favorably considered when –

(1) Based on conscientious objection which existed, but which was not claimed prior to notice of induction, enlistment or appointment.

> it barred presentation to the local board of a claim that allegedly arose between mailing of a notice of induction and the scheduled induction date.

402 U.S. at 107–108.

United States v. Shomock, 462 F.2d 338 (3d Cir. 1972), raised the question of whether *Ehlert* had overruled our decision in *Scott v. Commanding Officer*, 431 F.2d 1132 (3d Cir. 1970), and this court answered in the negative. The registrant had filed a post-induction order conscientious objector claim and had refused induction after being informed by the local board that the information he had submitted did not warrant reopening of his classification.

This court reversed the ensuing judgment of conviction. First, we held, under *Scott* the local board was obliged to inform the registrant of the basis for its denial of his claim, whether it was for "lack of jurisdiction or some other technical reason or was a decision based on the merits of Shomock's claim." 462 F.2d at 346. Furthermore, we held, *Ehlert* did not compel a different result because in the case at hand there was doubt that the registrant would in fact have received a full and fair hearing by the military of his conscientious objector claim. First, this court feared that the military might rely on AR 635–20 ¶ 3(b)(2),[5] not cited in *Ehlert*, to deny the registrant an in-service hearing on the merits of his claim on the ground that his claim had already been denied by the local board prior to induction.

Second, we noted that AR 635–20 ¶ 3(b)(1) at the time the registrant had refused induction and until August 15, 1970, precluded on its face in-service review of conscientious objector

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[5] AR 635–20, ¶3(b) provides:

> . . . Requests for discharge after entering military service will not be favorably considered when –
>
> * * *
>
> (2) Based solely on conscientious objection claimed and denied by the Selective Service System prior to induction.

This provision is quoted in United States v. Ziskowski, 475 F.2d 480, 485 (3d Cir. 1972).

claims which arose before induction, even if the claim arose after the registrant had received his induction notice.[6] This court therefore did not consider persuasive a letter addressed to it by the General Counsel of the Department of the Army which apparently relied upon the *amended* version of ¶ 3(b)(1), cited in *Ehlert*. The letter stated that Army practice was to permit in-service review of post-induction order conscientious objector claims which had been denied by a local board solely because of late crystallization of beliefs.[7]

For both of these reasons, the military might have refused to consider the registrant's claim on the merits, even though the local board might have rejected his claim by relying solely upon *Ehlert* without reaching the merits of his claim. There was a strong possibility, therefore, that the registrant had been placed

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[6] The provision had read as follows:

> . . . Requests for discharge after entering military service will not be favorably considered when –
>
> (1) Based solely on conscientious objection which existed but was not claimed *prior to induction*, enlistment, or entry on active duty for training. [Emphasis supplied.]

On August 15, 1970, the emphasized language was amended to read "prior to notice of induction." The amended version was quoted *Ehlert*. *See* note 4 *supra*.

[7] The relevant portions of the letter asserted the following:

> If the appellant had entered the Army in May 1969 under circumstances where the Selective System actually considered and denied his conscientious objector claim on the merits, he would not have been entitled to an in-service determination on the merits of his conscientious objector claim.
>
> If the appellant had entered the Army in May 1969 under circumstances where his local draft board merely refused to reopen his classification because his asserted views crystallized subsequent to the receipt of his induction notice, in the view of the Department of the Army personnel responsible for administering the conscientious objector claims of in-service members, he would have been entitled under Army policy to an in-service determination on the merits of his conscientious objector claim.

462 F.2d at 345 n. 17.

in the "no man's land" condemned by *Ehlert*, with no opportunity to have his post-induction order conscientious objector claim considered on the merits. His induction order was therefore held invalid.

The same issue was presented in *United States v. Ziskowski*, 465 F.2d 480 (3d Cir. 1972). The registrant had filed a post-induction order conscientious objector claim, and in response had received, following an interview, a letter stating that,

> It is the determination of the board that there has been no change in your status resulting from circumstances over which you had no control. Your classification has not been reopened.

465 F.2d at 481. On the authority of *Scott, supra*, this court reversed the ensuing conviction for refusing induction. We distinguished *Ehlert* by noting that the local board in that case had indicated that its refusal to reopen the registrant's classification was based on its finding that crystallization of conscientious objector beliefs was not a circumstance over which the registrant had no control. In the case before the court, however, it was not clear whether the denial was for this reason or for any one of several other reasons. *See* 465 F.2d at 482–483.

Moreover, this court found "substantial support" for this result from *Ehlert* itself. Relying on AR 635–20 ¶ 3(b)(2),[8] not cited in *Ehlert*, the court reasoned that even if the military interpreted that regulation to bar only in-service review of claims which had been denied *on the merits* by a local board,[9] the military might reasonably have construed the Board's action as to Ziskowski as having been a determination on the merits precluding in-service review. Therefore Ziskowski would have been in the "no man's land" which had been disapproved by *Ehlert*. The local board might have denied his claim for pro-

[8] *See* note 5 *supra*.

[9] As noted in *Ziskowski*, this interpretation was later adopted explicitly. 465 F.2d at 485 n. 12.

cedural reasons, while the military, interpreting the local board's denial as having been on the merits, might have then refused to consider his claim.

In *United States v. Folino*, No. 72–1974 (3d Cir., June 29, 1973), this court reversed a selective service conviction on the authority of *Ziskowski*.

The Supreme Court appears to have placed an abrupt end to this line of cases, however, by its recent per curiam decision in *Musser v. United States*, 42 U.S.L.W. 3286 (U.S. November 13, 1973). That case involved the consolidated appeal by two selective service registrants who had been convicted for refusing induction after having their post-induction order conscientious objector claims rejected by their local boards. One registrant had received a letter from his board stating that the board "did not specifically find there has been a change in status resulting from circumstances over which you had no control." The other registrant had received a letter stating simply that the board "found no ground for reopening your classification."

Petitioners relied upon *Ziskowski*, *Shomock*, and *United States v. Alioto*, 469 F.2d 722 (1st Cir. 1972), a similar case. The Supreme Court flatly rejected the reasoning of these cases. In answering the argument that the military might consider the local board's refusal to reopen to have been on the merits when it was in fact procedural, the Court stated that *Ehlert* had held that a local board was "without power" to rule on the merits of a post-induction order conscientious objector claim, and

> [f]rom this it follows that in no event can a mere refusal to reopen signify more than a recognition of lack of power to do so; it cannot and does not bear any significance as to the merits of a registrant's claim.
>
> * * *
>
> [N]o matter what the board's apparent motivations in refusing to reopen the petitioner's classification may have been, the boards were simply without power to reopen, and an expressed or unexpressed indication of

> the board's views of the claims cannot be deemed a denial of those claims on the merits.

As in *Ehlert*, the Court then turned "to a consideration of whether 'the conditions for the validity of such a rule . . . are met in practice.' " The Court noted AR 635–20, ¶ 3(b)(2), which seemed to bar in-service review of a claim which had been "claimed and denied" before induction.[10] The Court stated that,

> While the critical word "denied" might arguably be applied to a board's refusal to reopen a classification, it cannot be so applied to a refusal to reopen a classification based on a claim of conscientious objection crystallizing after issuance of a notice to report, now that Ehlert has made clear that such a refusal can only be based on the board's lack of power to reopen in such a posture.

The Court also relied upon the letter written by the General Counsel of the Department of the Army which we had considered in *Shomock*,[11] and which stated that when a refusal to reopen by a local board is not based on the merits, the registrant could receive a full in-service hearing on the merits. The Court concluded that,

> In the event that a local board in one way or another manifests its views as to the sincerity of late-crystallizing registrants' claims, such expressions must be given no effect by the armed forces in reviewing an in-service conscientious objection request.

Mr. Justice Douglas, in dissent, pointed out that "[t]he opinions summarily affirmed today conflict squarely, as the Solictor General concedes, with decisions in the First, Second, and Third Circuits." Included in the list of cases that follows this statement are *Shomock*, *Ziskowski*, and *Folino*. We agree that these three cases are inconsistent with *Musser* and for that reason are no longer the law.

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10 *See* note 5 *supra*.

11 *See* note 7 *supra*.

Musser was decided after the district court dismissed the indictment in this case, and of course long after Serfass himself refused induction. We must therefore decide whether *Musser* is to be applied retroactively to registrants who refused induction before the case was decided.

We have no hesitation in answering this question in the affirmative. *Musser* did not announce any new principle of law. Rather, the case, by relying on indications of military policy which were already before us in *Shomock* and *Ziskowski*, held that our interpretation of military policy in those cases was incorrect; there was no danger that the registrants whose convictions we had reversed would have found themselves in a "no man's land."

Furthermore, the two registrants whose convictions were affirmed in *Musser* had refused induction in February 1969 and January 1971, respectively. Serfass, as noted, refused induction in January 1971. *Musser* appears to hold, therefore, that even at the time Serfass refused induction, he would have been permitted by military policy to obtain an in-service review of his conscientious objector claim. He therefore cannot justify his refusal of induction on the ground that he faced the "no man's land" of *Ehlert*, even though his local board did not explain why it had denied his conscientious objector request.[12]

The order of the district court granting the motion to dismiss

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[12] *Ehlert* was decided on April 21, 1971. Serfass refused induction after *Scott* but before *Ehlert*. The Court in *Musser* implicitly held *Ehlert* retroactive, however, since it interpreted *Ehlert* as requiring the affirmance of two convictions for refusing induction, even though both acts had taken place before *Ehlert* was decided.

We note that since neither conviction affirmed by the Court in *Musser* involved a refusal of induction in a circuit in which the prevailing case law was at the time clearly contrary to *Ehlert*, the Court did not necessarily decide whether actual good faith reliance on pre-Ehlert case law might negate the element of willfulness necessary to sustain a conviction. *See*, e.g., United States v. Mercado, 478 F.2d 1108 (2d Cir. 1973).

the indictment will be reversed. The case will be remanded to that court for trial or other proceedings consistent with this opinion.